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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/662,783	09/15/2003	Thomas E. Yingst	DKE 9734	9519
321	7590	12/26/2008	EXAMINER	
SENNIGER POWERS LLP 100 NORTH BROADWAY 17TH FLOOR ST LOUIS, MO 63102			SHAPIRO, JEFFERY A	
		ART UNIT	PAPER NUMBER	
		3653		
		NOTIFICATION DATE		DELIVERY MODE
		12/26/2008		ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/662,783	<b>Applicant(s)</b> YINGST, THOMAS E.
	<b>Examiner</b> JEFFREY A. SHAPIRO	<b>Art Unit</b> 3653

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on **24 September 2008**.
- 2a) This action is **FINAL**.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) **40-46, 50 and 52-56** is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) **43-45, 52 and 53** is/are allowed.
- 6) Claim(s) **40-42, 46, 50 and 54-56** is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |                                                                                                                        |                                                                             |
|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                            | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | Paper No(s)/Mail Date _____                                                 |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 5) <input type="checkbox"/> Notice of Informed Patent Application (PTO-152) |
|                                                                                                                        | 6) <input type="checkbox"/> Other: _____                                    |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 54 and 55 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 54 recites the phrase "said power assist devices are mounted such that they are higher than the breath guard..."

Claim 55 recites the phrase "said second power assist device is mounted such that the entire...device remains higher than the than the breath guard..."

Since the power assist devices are in part attached to the breath guard, they cannot be entirely above, i.e., "higher" than the breath guard. It is suggested that the phrase "extends above the breath guard" or a functional equivalent be used instead.

***Claim Rejections - 35 USC § 103***

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to

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consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. **Claims 40-42, 46, 50, 54 and 55** are rejected under 35 U.S.C. 103(a) as being unpatentable over Perzon (US 6,141,984) in view of Fukushima et al (JP 401315559 A), further in view of Rhoads (US DES 188,719) and still further in view of Topper et al (6,547,346 B2) and further in view of Richter (US 6,766,616 B2).

6. **Regarding Claim 40,** Perzon discloses a product server (1), the product server having a transparent breath guard/cover (2), said product server being cooled (see abstract), said breath guard/cover being able to be rotated/pivoted through an angle of between 0 and 90 degrees. See figures 1-3.

Note that looking at figure 1, the employee/server side is construed to be near the side lower left, proximate the cover handles. Therefore, when the employee opens the cover as shown in figure 1, access is provided therein. The transparent covers (see col. 2, lines 60-64) in the raised position act as breath guards when in the open position, preventing customers from breathing directly onto the frozen items stored in the freezer. When in their lowered, generally horizontal position, the covers protect and seal the

items kept inside the freezer. The covers are pivotally attached to the freezer at the "customer side". See figure 2.

When open, the covers extend upward toward the rear employee side of the freezer/server. See figure 1.

Note that Perzon also has a recess, as illustrated in figure 1, that can support food serving pans.

**Regarding Claim 40,** Perzon does not expressly disclose, but Fukushima discloses using a gas spring/ "first power assist device" (1) and a damper cylinder/ "second power assist device" (2) in combination as a lifting assist device for a cover/door (3), for the purpose of decelerating the cover near the final closing location. See Fukushima, abstract and constitution as well as figures 1 and 2.

**Regarding Claim 41,** note that Fukushima's first power assist device (1) has a vertical force component that increases as the cover is raised.

**Regarding Claim 42,** note that Fukushima's first power assist devices necessarily operate such that the cover must be opened initially with manual assistance, and after a particular intermediate point, the first power assist device lifts the cover to its final location. This is apparent in Fukushima's figure 4, in which 4a and 4b illustrate positions which require more manual effort while 4c illustrates a position which requires little or no manual effort.

**Regarding Claim 46,** note that a ball and socket connection is considered a functional equivalent to Fukushima's cylinder and rod connections and are obvious substitutions of each other.

**Regarding Claim 50,** Perzon does not expressly disclose, but Rhoads discloses a serving cabinet having an upper frame with shelves. See figure 1, for example.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to have incorporated an employee side serving counter, shelf and associated frame members in Perzon's freezer, as taught by Rhodes.

One ordinarily skilled in the art would have been motivated to add a serving counter to Perzon's freezer for the purpose of providing space to prepare items for customers, as is apparent from Rhodes' figures.

One ordinarily skilled in the art would also have been motivated to add a shelf with associated left and right frame members above Perzon's freezer, for the purpose of supporting finished items for customers to obtain access thereto.

**Regarding Claim 40,** Perzon does not expressly disclose, but Topper discloses power assist devices that do not extend into said recess below said generally horizontal plane.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to have designed the first and second power assist devices not to extend into the recess below said generally horizontal plane, as taught by Topper, for the purpose of providing proper clearance for items to be stored in the storage area of Perzon's food product server.

**Regarding Claims 40, 50, 54, 55 and 56,** Perzon does not expressly disclose,

but Richter discloses first (12) and second (16) power assist devices that do not extend below a plane defined by the "lid" structure, i.e., the skylight window of Richter, into a volume beyond said generally horizontal plane as defined by the lid structure when it is fully closed. See Richter, figures 1-5, noting that the mechanism with the first and second power assist devices only extends between the window/skylight/lid (5) and the bottom of elements 1-4.

At the time of the invention, it would have been obvious to one or ordinary skill in the art to have designed the first and second power assist devices not to extend into the recess below said generally horizontal plane, as taught by Richter, for the purpose of providing proper clearance for items to be stored in the storage area of Perzon's food product server. Note that one ordinarily skilled would have been led to this design based upon the mechanism design of Richter in combination of the clear requirement to keep the mechanism from impinging on the stored materials below the lid as well as the disclosures of Topper and Fukushima. Note that Fukushima's mechanism does not extend above Fukushima's lid.

***Allowable Subject Matter***

7. Claims 43-45, 52, 53 and 56 are allowed.
8. The following is a statement of reasons for the indication of allowable subject matter: The prior art does not disclose, teach or suggest the food product server having a second power assist device positioned toward the front customer side of the product server with a cylinder connected to said upright frame member and a rod having a

connection with said breath guard, the first power assist device being located between the second power assist device and the rear employee side of the product server, said first power assist device comprising a cylinder having a connection with said cabinet and a rod having a connection with said breath guard.

***Response to Arguments***

9. Applicant's arguments with respect to Claims 40-42, 46, 50 and 54-56 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

10. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JEFFREY A. SHAPIRO whose telephone number is

(571)272-6943. The examiner can normally be reached on Monday-Friday, 9:00 AM-5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patrick H. Mackey can be reached on (571)272-6916. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jeffrey A. Shapiro/  
Examiner, Art Unit 3653

December 20, 2008